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IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CRIMINAL APPELLATE JURISDICTION

CRIMINAL REVISION APPLICATION No. 142 OF 1999

Shivgonda Mallikarjun Patil, Age 42 years, Occu.- Social worker and agriculturist R/o. Soregaon, taluka North Solapur, District Solapur.	Applicant
Vs.	
1. State of Maharashtra.	
2. Maruti Tatyaba Shinde, Age 48 years, R/o. Soregaon, Taluka North Solapur, District Solapur.	Respondents

Mr. Nitin Jamadar, advocate for the applicant.
Mrs. M. M. Deshmukh, APP for respondent Nos.1.
Mr. M. R. Katikar, Advocate for respondent no.2.

CORAM : V. R. KINGAONKAR, J.

DATE : APRIL 13, 2007.

ORAL JUDGMENT

This Revision Petition arises out of the judgment rendered by the learned 2nd Additional Sessions Judge, Solapur in Criminal Revision No. 17

of 1999.

2. It is not necessary to elaborately set out the facts, giving rise to the controversy, as point involved is short and the dispute lies in a narrow compass. A complaint was lodged by respondent no.2 Maruti at police station Valsang, alleging commission of offence, punishable under section 307, 341, 427, 504, 147, 148 read with section 149 of Indian Penal Code. Police registered crime No. 65 of 1998 against the present revision petitioner and other 6 accused persons. The petitioner explained during the course of investigation that he was else where at the relevant time and attended a public function. The plea of alibi was investigated by the police. That was found to bear ring of truth. The investigating officer, after completing the investigation, submitted a report under section 169 Cr.P.C. for release of the revision petitioner, who was original accused no.4, involved in the said crime. The learned Magistrate endorsed the report as “seen” and directed issuance of release order, in respect of accused no.4 / present revision petitioner.

3. The complainant had preferred a revision Application No. 17 of 1999. He asserted that he ought to have been heard, prior to passing of the order to release accused no.4 i.e. present Revision Petitioner. The learned Sessions Judge relied upon certain observations in case of **Union Public Service Commission Vs. Papaiah and Ors. [1998(3) Crimes 40 (S.C.)]**, allowed the Revision Petition and directed the trial Court to furnish opportunity to the complainant to make his submission, regarding the order of release.

4. It appears that original accused no.4 was not made a party to the said Revision Petition before the learned Sessions Judge, and therefore, being aggrieved by the said order, he filed the instant Revision Petition. This Court stayed the trial of the Criminal Case, to the extent of the Criminal Revision Petitioner, and therefore, the same was separated by the trial Court.

5. Significantly, the trial Court proceeded against the remaining 6 accused persons. The learned counsel Mr. Nitin Jamadar has placed on record, copy of the judgment of the trial Court

along with affidavit of the petitioner. It is manifest that the other 6 accused have been acquitted by the trial Court, from the charges levelled against them. Though the acquittal of other accused is not the issue involved in the instant Revision petition, yet it is relevant in order to understand the subsequent development.

6. Clinching question is as to whether the impugned judgment of the learned Additional Sessions Judge is legal, proper and correct. Mr. Jamdar, the learned counsel for the applicant would submit that the petitioner was a necessary party before the Revisional Court. He would contend that in the absence of the Revision Petitioner, who was accused no.4 and who was directed to be released, the Sessions Court should not have heard the Revision Application of the original complainant. He contended that principles of natural justice ought to have been extended, so as to protect right of the accused no.4, in whose favour the release order was issued. On the other hand, the learned counsel Mr. Katikar for respondent no.2 (complainant) and the learned APP Mrs. M. M. Deshmukh for respondent no.1 supports the impugned

order.

7. At the outset, it may be made clear that the order passed by the learned Magistrate on report under section 169 Cr.P.C. was just to release accused no.4 from the concerned jail. He did not pass any judicial order, regarding merits of the matter. He never decided rights of the parties. He only acted on the police report which communicated that no material evidence was available as against accused no.4. There cannot be any duality of opinion that if a judicial or quasi judicial order is rendered, in which rights of the parties are likely to be affected, then opportunity of hearing is necessary. The principle of *"Audi Alteram Partem"* has to be followed as a part of natural justice, only when some decision is to be arrived at by the Judicial Authority. Here is the case in which the role of the Magistrate was to facilitate release of the concerned accused, because he was in *"custodia legis".* The provision of the law, enumerated under section 169 of Cr.P.C. Would show that it is discretion of the police officer to decide whether evidence collected is sufficient to warrant filing of any report under section 170 or 173 Cr.P.C. If the police officer is of the

opinion that there is no sufficient evidence or reasonable ground of suspicion, to justify forwarding of accused to a Magistrate, it is his duty to release the accused, if the accused is in custody. The Magistrate has no role to play in such matter where the discretion is available to the police officer. It is not that the legal remedies are shut, after use of such discretion by the police officer. The complainant may file a private complaint case, if he is dissatisfied with the use of discretion by the police officer. Secondly, he may bring further material before the police officer and if sufficient reliable evidence is found the police officer may further proceed with investigation, in order to forward the accused to the concerned Magistrate. Obviously, the forwarding of the report to the Magistrate under Section 169 Cr.P.C. Was only a formality, which was necessary, in order to get release of accused no.4 from judicial custody. The learned Magistrate rightly did not pass any speaking order, regarding correctness of the use of discretion by the police officer or otherwise. What the learned Magistrate did was only to endorse the report as “Seen” and to direct release of the concerned accused.

Needless to say that there was absolutely need to give opportunity to the complainant at the stage of passing such order under section 169 Cr.P.C.

8. With assistance of the learned counsel for the parties and the learned APP, I have carefully gone though the case of **Union Public Service Commission Vs. Papaiah and Ors. (**supra). The observations of the learned Additional Sessions Judge in the context appear to be incorrect. The case law referred by him deals with the requirement of hearing only when report is filed under section 173 Cr.P.C. There cannot be any quarrel about the legal proposition that the complainant is required to be heard, before passing any final order on the report, filed under section 173 Cr.P.C.. Still, however, there is no such requirement of law in respect of the simple release of an accused on the basis of the material gathered during the course of investigation, at the preliminary stage itself, when the police officer is not satisfied with the quality of evidence or or that if it is not sufficient to forward accused to Magistrate. In such a case, the nature of release is like discharge of the accused and it does not amount to

acquittal. The Magistrate perhaps released the petitioner in view of section 59 of the Code of Criminal Procedure. Obviously, there was no substantial error committed by the learned Magistrate while passing the relevant order. It appears that learned Additional Sessions Judge Solapur, was wrong in holding that prior hearing of the complainant was necessary at the stage of passing order under section 169 Cr.P.C. The reliance of the Additional Sessions Judge on the aforesaid dictum of Apex Court is also misplaced and with due respect it deals with different subject, pertaining to report under section 173 Cr.P.C. Hence the impugned order is unsustainable.

9. In the result, the Revision Petition is allowed and the impugned judgment of the learned Additional Sessions Judge, Solapur is set aside.

Sd/-
[V. R. KINGAONKAR,J.]